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JURISDICTION OF THE UNITED STATES DISTRICT COURT AS AFFECTED BY ASSIGNMENT.[1]

THE RESTRICTIVE STATUTE.

PARAGRAPH 1 of Section 24 of the Judicial Code (the section which defines the original jurisdiction of the United States District Court) contains the following provision:

> "No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made."

The statute may thus be paraphrased:

When the jurisdiction of the United States District Court is

[1] This subject is treated in 1 FOSTER, FEDERAL PRACTICE (5th Ed.), pp. 199-207 (long and elaborate enumeration of head-notes with no attempt to interpret or classify the various holdings); CHAPLIN, PRINCIPLES OF THE FEDERAL LAW, pp. 673-6 (brief but thoughtful analysis of the statute); HUGHES, FEDERAL PROCEDURE, pp. 278-285 (useful discussion and analysis of the leading cases); WILLIAMS, JURISDICTION AND PRACTICE OF THE FEDERAL COURTS, pp. 54-57 (compact analysis of the main principles of the statute); BUNN, UNITED STATES COURTS, pp. 63-64 (brief and sketchy); 1 STREET, FEDERAL EQUITY PRACTICE, pp. 199-201 (brief and general); MONTGOMERY'S MANUAL OF FEDERAL PROCEDURE (2d Ed.), p. 55 (very brief); SIMKINS, FEDERAL EQUITY SUIT (2d Ed.), chapters 37 and 38 (emphasis on historical aspects of the statute and somewhat inaccurate).

The recent cases will be found in the Decennial Digests under "Courts," § 312.

invoked on the basis of diverse citizenship, the assignee of a chose in action arising out of contract (with the exception both of foreign bills of exchange and the instruments of corporations made payable to the bearer) cannot sue thereon, unless the requisite diversity of citizenship exists at the time the suit is commenced not only between the assignee and the defendant but also between the assignor and the defendant.

Though the language has been changed by amendments, the statute was in the judiciary act of 1789 and has ever since been on the Federal statute-book.[2] In spite of its awkward phrase-

[2] Section 11 of the judiciary act of 1789: "Nor shall any circuit or district court have cognizance of any suits to recover the contents of any promissory note, or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court if no assignment had been made. *Except* in cases of foreign bills of exchange."

The act of 1875: "No circuit or district court shall have cognizance of any suit founded on contract in favor of any assignee, unless suit might have been prosecuted in such court to recover thereon if no assignment had been made, *except* in cases of promissory notes negotiable by the law merchant, and bills of exchange." That notes are negotiable here though overdue when assigned, see Ackley School District *v.* Hall, 113 U. S. 135; New Providence *v.* Halsey, 117 U. S. 336; Cross *v.* Allen, 141 U. S. 528.

The act of 1888: "Nor shall any district or circuit court of the United States have cognizance of any suits, except on foreign bills of exchange, to recover the contents of any promissory notes, or other choses in action in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer, and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer has been made."

It will thus readily be seen that cases construing the acts of 1789 and 1875 must be cited with great caution in connection with the act of 1888 and section 24 of the Judicial Code. This is true in spite of section 294 of the Judicial Code providing: "The provisions of this act so far as they are substantially the same as existing statutes, shall be construed as continuations thereof, and not as new enactments."

The act of 1888 and the Judicial Code (Sec. 24) are practically identical. The act of 1888 reads "Any suit to *recover the contents of* any promissory note or other chose in action." The Judicial Code reads "Any suit to *recover upon* any promissory note or other chose in action." This does not seem to have changed the meaning of the statute. Brown *v.* Fletcher, 235 U. S. 589; Harlan *v.* Houston, 258 Fed. 611.

ology, the statute makes quite clear the evil it was designed to prevent: the creation of a cause of action justiciable by the United States District Court on the ground of diverse citizenship merely by assignment.[3] Thus A (of Virginia) has a contractual chose in action involving the jurisdictional amount (but with no basis of jurisdiction of the United States District Court) against B (also of Virginia). Save for the statute, the simple expedient of assigning this to C (of any State other than Virginia) would make a suit cognizable by that court. If the citizenship of both assignor and assignee is proper, the statute does not apply to assignments for the purpose of making up the jurisdictional amount.[4]

The statute (when applicable) is purely restrictive. It provides not that the assignee can sue if the assignor could have sued but that the assignee can sue only when both his citizenship and the citizenship of the assignor is proper. That the required diversity of citizenship exists on the part of the assignor

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[3] The statute, of course, negatives the opportunity for fraud on the jurisdiction of the United States District Court by colorable assignments to secure the required citizenship. Bank of the United States *v.* Planters Bank, 9 Wheat. 904; Brown *v.* Fletcher, 235 U. S. 589.

This phase of the situation is further safeguarded by Judicial Code, Sec. 37, giving the District Court the right to dismiss any suit that "does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court." The question of colorable assignments, and other devices, for the purpose of conferring jurisdiction on the Federal courts is beyond the scope of this article. This discussion presumes that the assignment is *bona fide*.

In Ban *v.* Columbia Southern R. Co., 117 Fed. 21, it was held that a Federal court (under the statute) has no jurisdiction of a suit on a cause of action in favor of a partnership brought by one partner both in his own right and also as assignee of his partner, unless the citizenship of both partners would permit the bringing of the suit by them.

[4] Bernheim *v.* Birnbaum, 30 Fed. 885; Chase *v.* Sheldon Roller-Mills Co., 56 Fed. 625; Bowden *v.* Burnham, 59 Fed. 752; Bergman *v.* Inman, 91 Fed. 293; Davis *v.* Mills, 99 Fed. 39; Brigham-Hopkins Co. *v.* Gross, 107 Fed. 769; Hartford Fire Ins. Co. *v.* Erie R. Co., 172 Fed. 899; Kentucky Wagon Mfg. Co. *v.* Jones, etc., Co., 248 Fed. 272.

In such cases, the jurisdiction attaches, unless the assignment is colorable. See cases cited above. Waite *v.* Santa Cruz, 184 U. S. 302. See Judicial Code, Sec. 37, incorporating the fifth section of the celebrated act of March 3, 1875.

as well as on the part of the assignee must appear upon the record.[5]

As to time, the proprieties of citizenship of both assignor and assignee are judged as of the date when the assignee institutes suit in the United States District Court. If then both assignor and assignee can bring suit, it is immaterial that the assignor could not have brought suit at the time of the assignment.[6]

Express Exceptions Made by the Statute.

The statute expressly exempts from its operation: (1) foreign bills of exchange, (2) instruments payable to bearer made by a corporation. As far as these are concerned, if the assignment is *bona fide*,[7] the citizenship of the assignee alone determines the jurisdiction and the citizenship of the assignor is immaterial.

Foreign Bills of Exchange.

A foreign bill of exchange is one "drawn in one state or country upon a foreign state or country."[8] Since these by their very nature (being drawn in one state or country and made

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[5] Bradley *v.* Rhines' Adm'rs, 8 Wall. 393; Parker *v.* Ormsby, 141 U. S. 81; New Orleans *v.* Benjamin, 153 U. S. 411; Kolze *v.* Hoadley, 200 U. S. 76; Betzoldt *v.* American Ins. Co., 47 Fed. 705; U. S., etc., Bank *v.* McNair, 56 Fed. 323; Smith *v.* Fifield, 91 Fed. 561; J. J. McCaskill Co. *v.* Dickson, 159 Fed. 704; Bison State Bank *v.* Billington, 209 Fed. 610.

[6] Jones *v.* Shapera, 57 Fed. 457; Emsheimer *v.* New Orleans, 186 U. S. 33. An averment merely that the assignor could have maintained the suit at the time of the assignment is not sufficient. Benjamin *v.* New Orleans, 74 Fed. 417. See also Noyes *v.* Crawford, 133 Fed. 796.

[7] See Judicial Code, Sec. 37. See also Williams *v.* Nottawa, 104 U. S. 209; Farmington *v.* Pillsbury, 114 U. S. 138; New Providence *v.* Halsey, 117 U. S. 336. See also Lehigh Mining and Manufacturing Co. *v.* Kelly, 160 U. S. 327; Southern Realty Investment Co. *v.* Walker, 211 U. S. 603; Cole *v.* Phila., etc., R. Co., 140 Fed. 944.

[8] Black, Law Dictionary. "A foreign bill of exchange is one of which the drawer and drawee are residents of countries foreign to each other." Bouvier, Law Dictionary. According to the Negotiable Instruments Law, Sec. 129, "An inland bill is a bill which is, or on its face purports to be, both drawn and payable within this state. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill." Under the Negotiable Instruments Law, Sec. 185, "A check is a bill of exchange drawn on a bank payable on demand." See, too, Bull *v.* Bank of Kasson, 123 U. S. 105.

payable in another state [9] or country) contemplate relations between citizens of different states or countries, they were wisely excepted from the restrictive statute, even in the original judiciary act.[10]

Instruments Payable to Bearer and Made by a Corporation.

In order that the instrument may be within the second express exception (and thus without the restrictive statute), two things must concur: (1) it must be payable to bearer, (2) it must be made by a corporation. The wide currency of these instruments seemed to warrant the wisdom of permitting the holders to sue on them in the Federal courts without reference to the citizenship of the assignor.

An instrument is, of course, payable to bearer [11] "when it is expressed to be so payable."[12] A note payable "to the order of ——" [13] or "to——or order" [14] is payable to bearer under the exception. So, too, is an instrument payable to a specified person *or bearer,*[15] and the same is true of a note made by the maker payable to itself and indorsed in blank by the maker.[16]

[9] That the States of the United States are foreign to one another in this connection, see Buckner *v.* Finley, 2 Pet. 586; Knickerbocker Life Insurance Co. *v.* Pendleton, 112 U. S. 696; Phoenix Bank *v.* Hussey, 12 Pick. (Mass.) 483; Wells *v.* Whitehead, 15 Wend. (N. Y.) 527; Todd *v.* Neal's Adm'r, 49 Ala. 266.

[10] Further discussion of the legal incidents of foreign bills of exchange is without the scope of this article and belongs more properly to works on negotiable instruments.

[11] " 'Bearer' means the person in possession of a bill or note which is payable to bearer." Negotiable Instruments Law, Sec. 190.

[12] Negotiable Instruments Law, Sec. 9 (1). It does not follow that an instrument that is payable to bearer under any of the five enumerations of the Negotiable Instruments Law, Sec. 9, is payable to bearer within the exception now under discussion. Certainly some of the cases held under the exception not to be payable to bearer would satisfy Sec. 9 (5) of the Negotiable Instruments Law. See cases cited *post,* note 18.

[13] Steel *v.* Rathbun, 42 Fed. 390.

[14] Reynolds *v.* Lyon County, 97 Fed. 155; Lyon County *v.* Keene Five Cent Savings Bank, 100 Fed. 337.

[15] Jerome *v.* Rio Grande County Comm'rs, 18 Fed. 873; Thompson *v.* Searcy County, 57 Fed. 1030; Gratiot County *v.* Aylesworth, 159 U. S. 250. See also Bullard *v.* Bell, 1 Mason 243, 252. 1 Fed. Cas. 624

[16] Barling *v.* Bank of British North America, 50 Fed. 260; Jones *v.* Shapera, 57 Fed. 457.

When on the bond of a municipal corporation payable to a specified individual (hence not payable to bearer under the exception), there are coupons payable to bearer, suit on the detached coupons is within the exception and the assignee sues regardless of the assignor's citizenship.[17] But a note payable to a specified individual and by him indorsed in blank is not payable to bearer within the exception.[18]

The word corporation here is of broad meaning and includes municipal [19] as well as private [20] corporations. Under municipal corporations are included not only cities [21] and towns [22] but also counties [23] and townships.[24]

INTERPRETATION OF THE STATUTE.

Chose in Action.

The term *chose in action*[25] "is one of comprehensive import.

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[17] Reynolds *v.* Lyon County, 97 Fed. 155; Independent School District of Sioux City *v.* Rew, 111 Fed. 1, holding, too, that jurisdiction over the assigned coupons is not divested merely because suit is at the same time improperly brought on the bonds.

[18] Rollins *v.* Chaffee County, 34 Fed. 91; Thomson *v.* Town of Ehon, 100 Fed. 145; State National Bank of Denison *v.* Eureka Springs Water Co., 174 Fed. 827. In the first of these cases it was said that if it is conceded that after such indorsement the note is in legal effect payable to bearer, it yet becomes so not "by virtue of an original and direct promise moving from the maker to the bearer but by virtue of an assignment of the promise." See also Cloud *v.* City of Sumas, 52 Fed. 177; New Orleans *v.* Benjamin, 153 U. S. 411.

[19] See cases cited in notes 21-24.

[20] Bank of British North America *v.* Barling, 46 Fed. 357; State National Bank of Denison *v.* Eureka Springs Water Co., 174 Fed. 827. See also Newgass *v.* New Orleans, 33 Fed. 196.

[21] New Orleans *v.* Quinlan, 173 U. S. 191; Citizens, etc., Bank *v.* City of Newburyport, 169 Fed. 766.

[22] Thomson *v.* Town of Elton, 100 Fed. 145; Andes *v.* Ely, 158 U. S. 312.

[23] Barnum *v.* Custer County, 34 Fed. 91; Thompson *v.* Searcy County, 57 Fed. 1030; Board of Comm'rs of Kearny County *v.* Irvine, 126 Fed. 689; Lake County Comm'rs *v.* Dudley, 173 U. S. 243; Gratiot County *v.* Aylesworth, 159 U. S. 250.

[24] Loeb *v.* Trustees of Columbia Township, 179 U. S. 472.

[25] For definitions of this term, see BOUVIER, LAW DICTIONARY; BLACK, LAW DICTIONARY; WORDS AND PHRASES.

In this statute the meaning of "chose in action" is not limited by the words "if such instrument be payable to bearer and be not made by

It includes the infinite variety of contracts, covenants and promises." [26] Though the term is frequently used in a sense broad enough to include claims arising out of torts,[27] it is yet clear that in this statute, the term applies only to claims arising out of contracts or torts connected with contracts.[28] A pure tort claim is not within the statute and the assignee sues thereon without reference to the citizenship of the assignor.[29]

Thus the statute has been held applicable to suits to recover debts,[30] suits to recover damages for breach of contract,[31] suits

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any corporation." Mexican National R. Co. *v.* Davidson, 157 U. S. 201; Skinner *v.* Barr, 77 Fed. 816.

[26] Sheldon *v.* Sill, 8 How. 441. When the principal contract is within the jurisdiction, this draws jurisdiction to determine the entire controversy, though some of the incidental contracts came to plaintiff by assignment from assignors unable to sue in the Federal court. Camp *v.* Peacock, 129 Fed. 1005, affirming 128 Fed. 1005; Howe, etc., Co. *v.* Haugan, 140 Fed. 182. The term, of course, applies to non-negotiable choses in action. Smith *v.* Fifield, 91 Fed. 561.

[27] Pitts *v.* Curtis, 4 Ala. 350; People *v.* Tioga Common Pleas, 19 Wend. (N. Y.) 73; Bennett *v.* Bennett, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553; City of Cincinnati *v.* Hafer, 49 Ohio St. 60, 30 N. E. 197; Wrightsville, etc., R. Co. *v.* Vaughan, 9 Ga. App. 371, 71 S. E. 691.

[28] That this is the usual acceptation of the term, see authorities cited in note 25

The Statute of 1875 uses the term "founded on contract," but this is omitted from the Statute of 1888 and the Judicial Code. See Bushnell *v.* Kennedy, 9 Wall. 387; Sere *v.* Pitot, 6 Cranch 332; Sheldon *v.* Sill, 8 How. 441; Tredway *v.* Sanger, 107 U. S. 323; Mersman *v.* Werges, 112 U. S. 139; Kolze *v.* Hoadley, 200 U. S. 76.

[29] Bushnell *v.* Kennedy, 9 Wall. 387; Ambler *v.* Eppinger, 137 U. S. 480 (trespass and conversion for cutting and taking away timber); Conn *v.* Chicago, etc., R. Co., 48 Fed. 177 (to recover overcharges for freight); Muller *v.* Chicago, etc., R. Co., 149 Fed. 939 (breach of duty of common carrier to carry and deliver goods); Barney *v.* Globe Bank, 2 Fed. Cas. 894 (claim against bank for failure to protest a draft); Crown Orchard Co. *v.* Dennis, 229 Fed. 652 (suit by grantee of standing timber to enjoin cutting and conversion of the timber). See also Deshler *v.* Dodge, 16 How. 622, and Buckingham *v.* Dake, 112 Fed. 258 (recovery of specific chattels or damages for caption or detention). See also Bertha Zinc, etc., Co. *v.* Vaughan, 88 Fed. 566, (suit by transferee of a share in an estate against administrators for devastavit).

[30] Utah Nevada Co. *v.* DeLamar, 133 Fed. 113.

[31] Bushnell *v.* Kennedy, 9 Wall. 387; Sheldon *v.* Sill, 8 How. 441; Corbin *v.* County of Black Hawk, 105 U. S. 659; Mersman *v.* Werges, 112 U. S. 139; North American, etc., Co. *v.* Morrison, 178 U. S. 262.

to compel specific performance of a contract,[32] foreclosure suits by assignees of mortgages,[33] also to a suit by the assignee of a mortgage (which has not ripened into legal title) to quiet title and cancel tax deeds,[34] to a suit on an assignment of water rents under a mortgage,[35] to a suit to enforce an accounting on behalf of a partner or agent,[36] to a suit for reformation of, and recovery upon, an insurance policy.[37]

Judgments.

Judgments, as such, are choses in action within the statutory prohibition.[38] When the judgment is based on contract, it seems clear that the assignee must show the required citizenship as to his assignor.[39] When, however, the judgment is based on a tort, the case is not clear. In the Walker, Metcalf and Mississippi Mills cases,[40] the statute of 1875[41] was in force which read "suit *founded on contract* in favor of an assignee," while the present statute leaves out the italicized words. Yet the present statute applies only to choses in action arising out of contract.[42] The Walker case[43] stresses the fact that

[32] Corbin *v.* Black Hawk County, 105 U. S. 659; Shoecraft *v.* Bloxham, 124 U. S. 730; Plant Investment Co. *v.* Jacksonville, etc., R. Co., 152 U. S. 71.

[33] Sheldon *v.* Sill, 8 How. 441; Blacklock *v.* Small, 127 U. S. 96; Kolze *v.* Hoadley, 200 U. S. 76; Nelson *v.* Eaton, 66 Fed. 376.

[34] Farr *v.* Hobe-Peters Land Co., 188 Fed. 10. Cf. Power and Irrigation Co. *v.* Capay Ditch Co., 226 Fed. 634, l. c. 640: "The plaintiff has acquired by conveyance the title to land," when the statute was held not to apply.

[35] City of Eau Claire *v.* Payson, 107 Fed. 552; American Waterworks, etc., Co. *v.* Home Water Co., 115 Fed. 171. See also New York Guaranty, etc., Co. *v.* Memphis Water Co., 107 U. S. 205.

[36] Brown *v.* Beacom, 174 Fed. 812.

[37] Laird *v.* Indemnity, etc., Co., 44 Fed. 712.

[38] Walker *v.* Powers, 104 U. S. 245; Metcalf *v.* Watertown, 128 U. S. 586; Mississippi Mills *v.* Cohn, 150 U. S 202; Sullivan *v.* Ayer, 174 Fed. 199.

[39] See cases cited in preceding note.

[40] See note 38.

[41] For text of this statute, see note 2.

[42] See cases cited in notes 28 and 29. See also as to construction of Judicial Code, Sec. 294: "* * * There shall be no implication of a change of intent by reason of a change of words in such statute, unless such change of intent shall be clearly manifest."

[43] 104 U. S. 245, l. c. 248-9.

the judgment was on a contract: "It is, however, permissible in all cases, where justice requires it, to inquire into the nature of the demand on which the judgment was rendered. If rendered on a contract, the judgment is a contract." It is, accordingly, suggested that the assignee of a judgment rendered on a tort claim can sue independently of the citizenship of his assignor.[44] Any other construction would place the assignee of a tort claim not reduced to judgment in a more favorable situation (as far as the jurisdiction of the United States District Court is concerned) than the assignee of a tort claim already reduced to judgment.

Transfer of Title to Land and Personal Chattels.

In spite of some expressions to the contrary,[45] the statute does not apply to transfers of title to land or personal chattels. Here the person suing is an owner rather than an assignee. When the owner seeks to recover either the land or chattel or damages for wrongful detention, then the citizenship of the person from whom the owner derived his title is of no importance. The statute applies to contractual obligations (*in personam*

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[44] But see *contra*, HUGHES, FEDERAL PROCEDURE, p. 279, though no cases are cited. Indeed no case directly in point has been found.

The ancient controversy as to whether a judgment is a contract throws little light on the instant question. Under some statutes, a judgment is a contract; under other statutes, it is not. But see Louisiana *v.* Mayor of New Orleans, 109 U. S. 285 (followed in many other cases), holding that a judgment based on a tort is not a contract within Art. 1, Sec. 10, of the United States Constitution, forbidding the States from passing any law "impairing the obligation of contracts." See, however, dissenting opinion of Harlan, J., in this case.

In Hultberg *v.* Anderson, 170 Fed. 657, it was held that where the assignee of a cause of action has reduced the same to judgment, in a subsequent action on this judgment in a Federal court, the citizenship of the assignor is immaterial. There was no suggestion in the case as to whether the original cause of action arose out of contract or fort, though the former seems probable. See, to the same effect, Ober *v.* Gallagher, 93 U. S. 199, 206, though here the cause of action arose out of contract.

[45] See, for example, Sheldon *v.* Sill, 8 How. 441, in which it was said that the term *chose in action* extended to "a right to recover a personal chattel."

rather than *in rem* claims), though such an obligation might be one to transfer title to specific property.[46]

In pursuance of this principle, the statute was held inapplicable to a replevin suit to recover a package of bank-notes,[47] the sale of an equitable interest in land,[48] replevin to recover steers claimed under a chattel mortgage,[49] sale of a mining claim,[50] conveyance of all the property of a partnership to a corporation,[51] injunction suit by the grantee of standing timber.[52] Perhaps the leading recent case on this subject is Brown *v.* Fletcher,[53] which held without the statute the transfer by a *cestui que trust* of his interest in the estate of a decedent.

Assignments.

The use of words "assignee" and "assignment" limits the statutory prohibition to causes of action (even though unripe)[54]

[46] See cases cited in note 32. See Jackson, etc., Co. *v.* Pearson, 60 Fed. 113; Coler *v.* Grainger County, 74 Fed. 16. See also Deshler *v.* Dodge, 16 How. 622; Bushnell *v.* Kennedy, 9 Wall. 387; Brown *v.* Fletcher, 235 U. S. 589; Buckingham *v.* Dake, 112 Fed. 258; Power & Irrigation Co. *v.* Capay Ditch Co., 226 Fed. 634. See also cases cited in notes 47-53.

[47] Deshler *v.* Dodge, 16 How. 622.

[48] Gest *v.* Packwood, 39 Fed 525.

[49] Buckingham *v.* Dake, 112 Fed. 258.

[50] Willitt *v.* Baker, 133 Fed. 937.

[51] Slaughter *v.* Mallet Land & Cattle Co., 141 Fed. 282.

[52] Crown Orchard Co. *v.* Dennis, 229 Fed. 652.

[53] 235 U. S. 589. Similar cases are Ingersoll *v.* Coram, 211 U. S. 335; Bertha Zinc, etc., Co. *v.* Vaughan, 38 Fed. 566; and Stotesbury *v.* Huber, 237 Fed. 413, involving the tranfer of a share in an estate. See also Weems *v.* George, 13 How. 190, suit by heirs of grantor of land against the grantee.

Shaffer *v.* Marks, 241 Fed. 139, was an injunction suit by the transferee of an oil and gas lease, and Aggers *v.* Shaffer, 256 Fed. 648, held such a lessee had a vested interest and was not within the statute; Menasha Wooden Ware Co. *v.* Southern Oregon Co., 244 Fed. 83, involved a suit by the transferee of a fund deposited in court; Jewett *v.* Bradford, etc., Bank, 45 Fed. 801, was a suit by the purchaser of stock to compel a transfer to him upon the books of the corporation. See also Harlan *v.* Houston, 258 Fed. 611. But see Blacklock *v.* Small, 127 U. S. 96; Gorman Wright Co. *v.* Wright, 134 Fed. 363 (pledgee of stock is an assignee).

[54] Chose in action is not a cause of action until the time for performance has passed and there has been a default.

It has been held that when the assignee can sue alone, he and his as-

existing in favor of the assignor against a third party, which cause of action is transferred to the assignee. In other words, the prohibition of the statute extends to derivative, not to original, causes of action. If, therefore, the effect of a transaction (however closely this may be related to an existing cause of action) is to bring into being a new and hitherto non-existent cause of action, then a suit on this last cause of action is beyond the pale of the statute.[55]

This principle is frequently invoked in the case of negotiable instruments. Thus the payee of a note made for his accommodation has no cause of action against the maker; so that the negotiation to a third party is the creation, not the assignment, of a right to sue on the note.[56] The acceptance (by the party against whom it is drawn) of a draft creates, too, an original obligation.[57] So, too, can an indorsee sue his immediate indorser without regard to the statute; for the liability here springs from the original contract between these two.[58]

The statute does not cover a claim under the equitable doctrine of subrogation, for this also is original.[59] Nor does the statute apply to a cause of action arising after the assignment.[60]

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signees can sue together as if no assignment had been made. Paige *v.* Rochester, 137 Fed. 663.

[55] Thus a suit on a forthcoming bond taken by the sheriff is not a suit on an assigned cause of action, though the statute gave the plaintiff the right to sue "the same as if the bond had been assigned to him." Smith *v.* Packard, 98 Fed. 793. See Bullard *v.* Bell, 1 Mason 243, 1 c. 252-3, 4 Fed. Cas. 624.

[56] Holmes *v.* Goldsmith, 147 U. S. 150. So, too, where a municipal corporation (for business convenience) made its notes payable to its treasurer, who endorsed the notes to purchasers. Blair *v.* Chicago, 201 U. S. 400. See also Hoadley *v.* Day, 128 Fed. 302; Kirvin *v.* Virginia-Carolina Chemical Co., 145 Fed. 288; Baltimore Trust Co. *v.* Screven County, 238 Fed. 834.

[57] City of Superior *v.* Ripley, 138 U. S. 93.

[58] Young *v.* Bryan, 6 Wheat. 146; Coffee *v.* Planters Bank, 13 How. 183; Parker *v.* Ormsby, 141 U. S. 81; Kolze *v.* Hoadley, 200 U. S. 76. But the statute is applicable to suits against the maker (State, etc., Bank *v.* Eureka Springs Water Co., 174 Fed. 827) or against some other prior indorser (Turner *v.* Bank, 4 Dall. 8; Mollan *v.* Torrance, 9 Wheat. 537; Skinner *v.* Barr, 77 Fed. 816).

[59] New Orleans *v.* Gaines's Adm'r, 138 U. S. 595. But see American Waterworks, etc., Co. *v.* Home Water Co., 115 Fed. 171.

[60] Hay *v.* Alexandria, etc., R. Co., 20 Fed. 15 (to vacate satisfaction

The right to rescind a contract (assumed by the complainant) on the ground of fraud of defendant and third persons was also held not within the statute.[61] Suits by the assignee against the assignor are not covered by the prohibition of the statute.[62]

"The evil which the law was intended to obviate was the *voluntary* creation of Federal jurisdiction by stimulated assignments. But *assignments by operation of law,* creating legal representatives, are not within the mischief or reason of the law." [63] Accordingly it is properly held that excutors and administrators are not assignees under the statute.[64] It would seem that the same is true of a guardian vested by law with a right to sue in his own name as *dominus litis*,[65] also of a receiver.[66] But

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of a judgment marked satisfied after the assignment); Noyes *v.* Crawford, 133 Fed. 796 (when the conspiracy on which cause of action was based came after the assignment of the contract for the sale of real estate); Oak Grove Construction Co. *v.* Jefferson County, 219 Fed. 858 (the disputed items accruing after the assignment); County of Cullman (Ala.) *v.* Vincennes Bridge Co., 251 Fed. 473 (work done after assignment of building contract). See also Weems *v.* George, 13 How. 190.

[61] Commonwealth S. S. Co. *v.* American Shipbuilding Co., 197 Fed. 780. See also Indiana *v.* Glover, 155 U. S. 513

[62] See Prest-O-Lite Co. *v.* Avery, etc., Co., 164 Fed. 69 (to charge assignor as trustee *ex maleficio*).

[63] New Orleans *v.* Gaines's Adm'r, 138 U. S. 595, l. c. 606. But in Sere *v.* Pitot, 6 Cranch 332, l. c. 336, Marshall, C. J. said: "The circumstance that the assignment was made by operation of law, and not by the act of the party, might probably take the case out of the policy of the act but not out of its letter and meaning." Quoted with approval in United States National Bank *v.* McNair, 56 Fed. 323, l. c. 326. But criticized in Bushnell *v.* Kennedy, 9 Wall. 387, 393. See also Weems *v.* George, 13 How. 190, in which the act of 1789 was held inapplicable to a suit by the heirs of a grantor of an interest in land against the grantee for non-fulfillment of his contract to extinguish liens on the land. See also Coler *v.* Grainger County, 74 Fed. 16, 22.

[64] Chappedelaine *v.* Dechenaux, 4 Cranch 305; Sere *v.* Pitot, 6 Cranch 332; Childress *v.* Emory, 8 Wheat. 642; Mayer *v.* Foulkrod, 4 Wash. 349, 16 Fed. Cas. 1231. See also Bushell *v.* Kennedy, 9 Wall. 387, l. c. 391; New Orleans *v.* Gaines's Adm'r, 138 U. S. 595, l. c. 606.

[65] New Orleans *v.* Gaines's Adm'r, 138 U. S. 595, l. c. 606; Mexican Central R. Co. *v.* Eckman, 187 U. S. 429, l. c. 434.

[66] Irvine *v.* Bankard, 181 Fed. 206. Though not directly in point, see Gaines's Adm'r, 138 U. S. 595, 606; also in Glass *v.* Concordia Parish Davies *v.* Lathrop, 12 Fed. 353; Paige *v.* Town of Rochester, 137 Fed. 663; Thompson *v.* Pool, 70 Fed. 725. See *dictum* in New Orleans *v.*

the statutory restriction, it has been held, includes assignees in insolvency [67] and purchasers at judicial sales.[68]

It seems clear that the statute applies only to the plaintiff's side of the controversy, and that it has no reference to a suit against a defendant who has become liable under an assignment.[69] Thus when the lessor sues the assignee of a lessee for rent under a lease, no attention need be paid to the citizenship of the lessee.[70]

The prohibition of the statute is aimed only at the original assignor and the last assignee. If the required diversity of citizenship exists between the original assignor and the defendant and also between the last assignee (plaintiff) and the defendant, the fact that parties to mesne assignments could not sue the defendant is of no consequence.[71] Thus if A (of Va.) have a cause of action against B (of Md.), cognizable in the United States District Court, and A assign this to C (of Md., a citizen of the same State as the defendant) and C then assign this to D (of any State except Md.), the statute does not prevent suit by D against B.

Police Jury, 176 U. S. 207, l .c. 210, "a universal legatee or a receiver." *Contra*, United States National Bank *v.* McNair, 56 Fed. 323. See also Sere *v.* Pitot, 6 Cranch 332, 336.

[67] Sere *v.* Pitot, 6 Cranch 332. In Guaranty Trust Co. *v.* McCabe, 250 Fed. 699, one to whom the entire bankrupt estate had been conveyed as trustee by the selection of the creditors was held to be a voluntary assignee of choses in action.

[68] Glass *v.* Concordia Parish Police Jury, 176 U. S. 207. Here warrants were bought. When, however, lands or goods are bought, then, it would seem, the statute would not apply. See cases cited in notes 46-53, particularly Brown *v.* Fletcher, 235 U. S. 589. This was expressly held in Portage City Water Co. *v.* City of Portage, 102 Fed. 769, when the purchaser under a foreclosure sale by the marshal acquired rights in real property.

[69] Brooks *v.* Laurent, 98 Fed. 647.

[70] Adams *v.* Shirk, 105 Fed. 659.

[71] Emsheimer *v.* New Orleans, 186 U. S. 33; Bolles *v.* Lehigh Valley R. Co., 127 Fed. 884; Farr *v.* Hobe-Peters Land Co., 188 Fed. 10; Portage City Water Co. *v.* City of Portage, 102 Fed. 769.

Where the original owner of a chose in action (capable of suing thereon in a Federal court) assigned this, he can sue thereon in this court, on again becoming the owner by re-assignment from his assignee, without regard to the citizenship of the latter. Moore Bros Glass Co. *v.* Drevet Mfg. Co., 154 Fed. 737.

Novation.

Novations are without the statutory inhibition.[72] Here the plaintiff sues not on the assigned chose in action but as promisee under the new promise. The plaintiff's cause of action is therefore original rather than derivative. The leading case is American Colortype Co. *v.* Continental Colortype Co.[73] Here the contract of employment, transferred by an Illinois corporation to a New Jersey corporation, was accepted by the employees.

Statute Controls Jurisdiction Not Venue.

The statute, it is believed, controls only jurisdiction[74] of the United States District Court; it was not intended to control the venue,[75] the district in which the suit must be brought.[76] Since

[72] See cases cited in note 73. See also Superior City *v.* Ripley, 138 U. S. 93; New Orleans *v.* Quinlan, 173 U. S. 191; Adams *v.* Shirk, 105 Fed. 659; Virginia-Carolina Chemical Co. *v.* Sundry Ins. Cos., 108 Fed 451; City of Seymour *v.* Farmers, etc., Trust Co., 128 Fed. 907. It is probably not necessary here that a technical novation be created, if the defendant consent to the assumption of the chose in action by the plaintiff, or if the original contract is modified by a new contract under which the cause of action sued on arises. See American Colortype Co. *v.* Continental Colortype Co., 188 U. S. 104, 108.

[73] 188 U. S. 104. This case is cited and approved in J. I. Case Threshing Machine Co. *v.* Road Improvement District, 210 Fed. 366, in which the court quotes the definition of a novation from *In re* Ransford, 194 Fed. 658, 662: "'The substitution by mutual agreement of one debtor or of one creditor by another, whereby the old debt is extinguished, or the substitution of a new debt or obligation for an existing one which is thereby extinguished.' For learned article on novations by Dean Ames, see 6 HARV. LAW REV. 184.

[74] "Jurisdiction is the power to adjudicate a case upon the merits and dispose of it as justice may require." Justice Brown in The Resolute, 168 U. S. 437, l. c. 439.

[75] On the general question of venue in the United States District Court, see article by the author, 2 VA. LAW REV. 1.

[76] Bolles *v.* Lehigh Valley R. Co., 127 Fed. 884 (plaintiff citizen of New York, defendant citizen of Pennsylvania, assignor citizen of West Virginia—suit in Southern District of New York held proper); Stimson *v.* United Wrapping Machine Co., 156 Fed. 298 (plaintiff citizen of New York, defendant citizen of Illinois, assignor citizen of West Virginia—suit in Western District of New York held proper). See also Whitman *v.* Taubel, 168 Fed. 1023; Vaile *v.* Moffat, 168 Fed. 1023; Ferguson *v.* Consolidated Tire Co., 169 Fed. 888 (citing and approving the Bolles and Stimson cases).

the statute covers only cases in which jurisdiction is based on diverse citizenship, the proper venue is either the district of the plaintiff (assignee) or the district of the defendant.[77] If the statute be satisfied as to jurisdiction, the plaintiff and defendant determine the proper district. Then the assignor, from the standpoint of venue, may be disregarded. Many cases, however, take the opposite view; these limit both jurisdiction and venue under the statute and insist that the district must be one in which the assignor could have sued in the United States District Court.[78]

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[77] Judicial Code, Sec. 51.

[78] In Dulles *v.* H. D. Crippen Mfg. Co., 156 Fed. 706, the Bolles case is mentioned without approval or disapproval, the court holding that the question of venue was waived by the entry of a general appearance. See Cincinnati, etc., R. Co. *v.* Orr, 215 Fed. 261, which also seems to have turned on waiver.

See Tierney *v.* Helvetia, etc., Insurance Co., 163 Fed. 82, brief opinion citing no cases directly in point on this question; Consolidated Rubber Tire Co. *v.* Ferguson, 183 Fed. 756 (C. C. A. for 2d Circuit), reversing the Ferguson case cited in note 76, but citing no cases; Waterman *v.* Chesapeake & Ohio R. Co., 199 Fed. 667, citing and approving the two preceding cases, with no mention of any of the cases cited in note 76; Ostrom *v.* Edison, 244 Fed. 228, 235, cites the two preceding cases but really decides only that a case pending in a State court can be removed to the Federal district court only for the district which territorially includes the State court; Guaranty Trust Co. *v.* McCabe, 250 Fed. 698, squarely approves (Hand J., dissenting) Consolidated Rubber Tire Co. *v.* Ferguson, 183 Fed. 756, and the United States Supreme Court denied a *certiorari,* McCabe *v.* Guaranty Trust Co., 247 U. S. 505.